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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 209

RAILROAD TRANSFER SERVICE INC., A DELAWARE CORPORATION,

Petitioner,

vs.

THE CITY OF CHICAGO, A MUNICIPAL CORPORATION; RICHARD J. DALEY, NOT INDIVIDUALLY, BUT AS MAYOR OF THE CITY OF CHICAGO; RAYMOND F. SIMON, NOT INDIVIDUALLY, BUT AS CORPORATION COUNSEL OF THE CITY OF CHICAGO; ORLANDO WILSON, NOT INDIVIDUALLY, BUT AS SUPERINTENDENT OF POLICE OF THE CITY OF CHICAGO; AND JAMES CARTER, NOT INDIVIDUALLY, BUT AS PUBLIC VEHICLE LICENSE COMMISSIONER OF THE CITY OF CHICAGO,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESPONDENTS' BRIEF.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

RESPONDENTS' BRIEF.

QUESTIONS PRESENTED.

1. Whether what petitioner did to obtain licenses prior to filing this action in any way conflicts with the Commerce Clause or the Interstate Commerce Act?

2. Where petitioner has applied for and has received licenses under Chapter 28 of the Municipal Code of Chi-

cago, is any case of actual controversy presented in regard to provisions of the ordinance which have not been applied to it?

3. Whether Section 28-6 is substantially the same now as it was when petitioner attacked the validity of Chapter 28 in 1956, and, if so, is petitioner now precluded from challenging this section?

4. Whether petitioner's present characterization of Section 28-6 is properly before this Court, not having been made in the courts below, and whether that characterization is correct?

5. Does petitioner maintain its principal place of business in Chicago because it only does business in Chicago and not because of any requirement of the ordinance?

6. Whether petitioner may properly attack a provision of the ordinance not contained in Chapter 28, and whether a requirement that drivers of public passenger vehicles who drive only on the streets of Chicago must be residents of the City establishes "accessible responsibility?"

7. Whether petitioner may properly attack a provision of the ordinance which applies only to taxi-cab operators.

STATEMENT OF THE CASE.

Prior to filing the present action, Railroad Transfer Service, Inc., sometimes hereafter referred to as Transfer or Petitioner, applied for and was issued licenses for its terminal vehicles (R. 71, 136). To obtain the licenses it did the following: It submitted an application, it tendered a check for $1,630 representing the license fees, and it filed a list of equipment, a financial statement, a corporate certificate of authorization, a certificate of insurance, and the corporate charter (R. 71). In regard to the license fees, petitioner's vice president stated (R. 126):

"that except for such payment, no other requirements

> have been made by the Public Vehicle License Commissioner from that time until September 15, 1961, when he demanded payment of the 1961 fees as is shown by Exhibit B."

For the years 1961, 1962 and 1963, petitioner has deposited its license fees with the Clerk of the District Court, and the Annual Reports of the Public Vehicle License Commissioner for 1962 and 1963 indicate that Transfer was considered to have been licensed for those years (R. 80, 95).

On August 12, 1959, immediately prior to the amendment of Chapter 28 of the Municipal Code of Chicago, counsel for petitioner wrote to the Public Vehicle License Commissioner suggesting a change in the license fee schedule that it would find acceptable (R. 112). The City did not adopt the proposed fee schedule when the ordinance was amended (R. 121).

The District Court, after considering the pleadings and the arguments of counsel, was under the impression that petitioner simply did not wish to pay license fees. In its Memorandum Opinion that Court characterized the basis of petitioner's complaint as follows (R. 133):

> "If I am to find the principal source of the plaintiff's claimed grievance, it is that plaintiff is required to pay an annual 'license or tax' to the City of Chicago for the privilege of operating its terminal vehicles, whereas public utilities and other companies carrying on a similar business are not subject to the same requirement."

Section 28-6 of the Municipal Code of Chicago, the provision which petitioner has devoted most of its brief to discussing, and which does not relate to fees, was characterized in the complaint as follows (R. 8):

> "That the Public Vehicle License Commissioner of the City of Chicago is authorized to issue said licenses upon application if he finds 'that each said vehicle is

registered in applicant's name and is in safe and proper condition at the time the license is issued' and if the cost of said license is paid by applicant (Sec. 28-6, Municipal Code of Chicago)."

In the Court of Appeals, Transfer said in regard to Section 28-6 (Brief and Appendix for Plaintiff-Appellant, in the United States Court of Appeals, No. 15230, filed September 1965, p. 11):

> "Furthermore Section 28-6 permits the Commissioner to refuse to renew plaintiff's licenses without giving it a hearing after the Commissioner finds plaintiff not to be in compliance with all of the provisions of the ordinance."

In 1956, Transfer first brought an action to have all of Chapter 28 of the Municipal Code of Chicago declared invalid as applied to it. The Federal District Court upheld the validity of the entire Chapter. *Atchison, Topeka & Santa Fe Railway Co.* v. *City of Chicago,* 136 Fed. Supp. 476 (N. D. Ill. 1956). The Court of Appeals for the Seventh Circuit reversed only to the extent of holding Section 28-31.1 unconstitutional, 240 F. 2d 930 (7th Cir. 1957). This Court affirmed the Court of Appeals, 357 U. S. 77 (1958). In its brief before this Court at that time, petitioner stated (Brief of Appellees-Respondents, In the Supreme Court of the United States, No. 104, filed October 21, 1957, p. 5):

> "The City of Chicago has regulated the interstation transfer vehicles for many years by Chapter 28 of the Chicago Municipal Code. This chapter regulates all 'public passenger vehicles' and includes the transfer vehicles which it defines as 'terminal vehicles.' Prior to July 26, 1955, terminal vehicles were covered only by §§ 28-1 to 28-18, 28-31 and 28-32 of Chapter 28 (R. 171-189). These sections of Chapter 28 are not in issue, having been found applicable and valid by the Court of Appeals (R. 208-209, 200)."

At the time that petitioner first attacked Chapter 28 of the Municipal Code of Chicago, Section 28-6 provided as follows (R. 20):

> "Upon receipt of an application for a public passenger vehicle license the commissioner shall cause an investigation to be made of the character and reputation of the applicant as a law abiding citizen; the financial ability of the applicant to render safe and comfortable transportation service, to maintain or replace the equipment for such service and to pay all judgments and awards which may be rendered for any cause arising out of the operation of a public passenger vehicle during the license period. If the commissioner shall find that the applicant is qualified and that the vehicle for which a license is applied for is in safe and proper condition as provided in this chapter, the commissioner shall issue a public passenger vehicle license to the owner of the vehicle for the license period ending on the thirty-first day of December following the date of its issuance, subject to payment of the public passenger vehicle license fee for the current year."

This provision presently provides (§ 28-6 Municipal Code of Chicago, R. 27):

> "Upon receipt of an application for a public passenger vehicle license the commissioner shall cause an investigation to be made of the character and reputation of the applicant as a law abiding citizen; the financial ability of the applicant to render safe and comfortable transportation service, to maintain or replace the equipment for such service and to pay all judgments and awards which may be rendered for any cause arising out of the operation of a public passenger vehicle during the license period. If the commissioner shall find that the application, and all other statements and documents required to be filed with said application have been properly executed, and that the applicant is qualified to pursue the occupation of a cabman or coachman, the commissioner shall issue to him and in his name a license for each public passenger vehicle

applied for, to terminate on the 31st day of December following the date of issue, provided that each said vehicle is registered in applicant's name and is in safe and proper condition at the time the license is issued."

Transfer operates under a year to year contract between itself and the railroads (R. 7).

SUMMARY OF ARGUMENT.

I.

Unlike the situation which confronted this Court in *Chicago* v. *Atchison, Topeka and Santa Fe Railway Company*, 357 U. S. 77 (1958), petitioner, in the case at bar, has applied for and has received licenses for its terminal vehicles. To obtain those licenses Transfer did the following: It submitted an application, it tendered a check for $1,630 representing the license fees, and it filed a list of equipment, a financial statement, a corporate certificate of authorization, a certificate of insurance, and the corporate charter (R. 71). This amounts to little more than registration and the payment of fees, requirements which have long been held valid. In this case, both Transfer and the City have acted, and experience has demonstrated that petitioner need only pay the terminal vehicle licensing fees and comply with very modest registration requirements to satisfy the applicable terms of the ordinance.

II.

Both the District Court and the Court of Appeals found that no case of actual controversy had been presented by petitioner.

A. Railroad Transfer, and not the City, has resurrected Section 28-6 for the sole purpose of attempting to create controversy where none exists. Section 28-6 is totally

unlike Section 28-31.1 the "convenience and necessity" provision which has long since been repealed. This latter provision applied exclusively to terminal vehicles, and precluded Transfer from operating until the City Council, on the recommendation of the Public Vehicle Commissioner, determined that additional terminal vehicles were needed. This Court in *Chicago* v. *Atchison, Topeka & Santa Fe Railway Company*, 357 U. S. 77 (1958), declared Section 28-31.1 invalid as applied to Transfer.

Section 28-6 applies to the thousands of public passenger vehicles which operate daily on the streets of Chicago, and was not designed to preclude Transfer from conducting its interstate business. Transfer does not have to obtain a certificate of "public convenience and necessity" to operate, but has applied for and received licenses for its vehicles, and has been operating them continuously without being subjected to the forbidden practices it now attributes to the ordinance. The City has maintained throughout this litigation that it is bound by this Court's decision in the *Atchison* case.

Section 28-6 has remained substantially the same since 1956 when petitioner first launched its attack on Chapter 28 of the Municipal Code of Chicago. It certainly was not amended to subvert the *Atchison* case. In spite of the similarity between Section 28-6 as it exists now and as it existed when Chapter 28 was before this Court in 1957, Transfer, at that time, failed to voice any objection to it. Instead, it conceded its validity as determined by the Court of Appeals.

Further, petitioner has deliberately chosen to ignore the first sentence of Section 28-6. The Section requires that an applicant be a "law abiding citizen;" that he show financial ability only to the extent necessary to render "safe and comfortable service"; and that he "maintain or re-

place equipment for such service and . . . pay all judgments and awards which may be rendered for any cause arising out of the operation of a public passenger vehicle during the license period." These are specific safety requirements, and are conditions the Commissioner must abide by in determining whether an applicant is qualified.

The characterization which petitioner has now chosen to give Section 28-6 was not presented to either the District Court or the Court of Appeals. The petitioner should not be permitted to change its theory of the case at this time; but, even if this Court permits such a change, the sincerity of Transfer's fears regarding this Section cannot help but be questioned.

The mere susceptibility of the ordinance to a construction which could render it unconstitutional is not a proper basis for an injunction where there is no showing that the ordinance has ever been so construed or that the City has any intention of so construing it. In this case, the plainest construction of the ordinance is one which avoids a question of its constitutionality.

B. Transfer maintains its principal place of business in Chicago because its business is transporting passengers and baggage from one railway terminal in the City to another railway terminal in the City. It does not allege that it wishes to maintain its principal place of business elsewhere, and, surely, no controversy is engendered by an ordinance requiring petitioner to do that which it is doing, especially where it has not expressed a desire to do anything else. There has been no showing that the challenged provision even applies to Transfer.

C. The provision relating to chauffeur's qualifications is not contained in Chapter 28, the only part of the Municipal Code of Chicago challenged in the complaint. There has been no allegation that the challenged provision has

in any way damaged petitioner. A requirement that drivers who operate vehicles solely on the streets of Chicago be residents of the City, establishes, as the Court of Appeals pointed out, "accessible responsibility."

D. The City has not sought to impose on petitioner the requirement that it file annually a detailed statement of its expenses and earnings and afford the City access to its books. This provision was designed to apply only to taxi-cab operators for use in determining rates. The fact that the section uses the term "corporation" does not mean it was intended to apply to Transfer, or to every corporation doing business in Chicago.

ARGUMENT.

I.

Prior to filing the present action Transfer applied for and received licenses for its terminal vehicles. What it did to obtain those licenses did not in any way conflict with the Commerce Clause or the Interstate Commerce Act.

Unlike the situation which confronted this Court in *Chicago* v. *Atchison, Topeka and Santa Fe Railway Company*, 357 U. S. 77 (1958), the petitioner, in the case at bar, has applied for and has received licenses for its terminal vehicles. What it did to obtain those licenses is the best measure of what it has to do to comply with the City's ordinance.

On August 12, 1959, immediately prior to the amendment of Chapter 28 of the Municipal Code of Chicago, counsel for petitioner wrote to the Public Vehicle License Commissioner suggesting a change in the license fee schedule which the petitioner would find acceptable (R. 112). The proposed fee schedule was not adopted when the ordinance was amended on August 24, 1959 (R. 121). On August 26, 1960, an officer of petitioner along with one of its attorneys went to the office of the Public Vehicle License Commissioner seeking to pay fees and obtain licenses, under protest (R. 125). This tender was refused (R. 125). The petitioner's vice president alleged that since "he could not risk even a temporary disruption in service" he authorized the payment of fees for 1960 (R. 126). It is significant that it was the payment of fees which petitioner deemed crucial to obtaining the licenses. This supports the District Court's view that the "principal source of the plaintiff's claimed grievances . . . is that plaintiff is required to pay an annual license or tax" (R. 133).

On August 26, 1960, petitioner applied for the licenses, without protest, and the licenses were issued (R. 71, 136). To obtain the licenses it submitted an application, it tendered a check for $1,630 representing the license fees, and it filed a list of equipment, a financial statement, a corporate certificate of authorization, a certificate of insurance, and the corporate charter (R. 71).

In 1961, the petitioner, perhaps no longer fearful of even "a temporary disruption in service," refused to pay its license fees (R. 126). Pointedly, in regard to the 1960 fees, the petitioner's vice president stated (R. 126):

> "that except for such payment, no other requirements have been made by the Public Vehicle License Commissioner from that time until September 15, 1961, when he demanded payment of the 1961 fees, as is shown by Exhibit B . . ."

Exhibit B is the touchstone of petitioner's contention that the City is seeking to apply those provisions of the ordinance which petitioner contends (Br. pp. 8, 27) are in conflict with the Commerce Clause, the Interstate Commerce Act, 49 U. S. C. §§ 1 (4), 3 (4), 302 (c) (2), and the *Atchison* case, 357 U. S. 77 (1958). Exhibit B is a letter which states that unless petitioner complies with the ordinance it is ordered to cease and desist its operation (R. 128).

There are at least two answers to petitioner's present interpretation of the letter. First, even petitioner's vice president indicated that this letter was simply a demand for the payment of the license fees; i. e., nothing more was required "until September 15, 1961, when he demanded payment of the license fees as is shown by Exhibit B . . ." (R. 126). Read in the context of petitioner's unwarranted failure to pay its fees for 1961, the letter does not measure up to petitioner's present interpretation. Second, the City has repeatedly disclaimed any power to order petitioner

to cease and desist its operation. As pointed out by the District Court in its Memorandum Opinion (R. 136):

> "Since the complaint was filed, no action has been taken by [the Public Vehicle License Commissioner] except the admonitory letter of September 16, 1961. Defendant now concedes that the threat made in this letter was an idle threat and that under the ruling in the *Atchison* case, the City would have no right to issue a 'cease and desist' order."

For the years 1961, 1962 and 1963, petitioner has deposited its license fees with the Clerk of the District Court, and the Annual Reports of the Public Vehicle License Commissioner for 1962 and 1963 indicate that Transfer was considered to have been licensed for those years (R. 80, 95).

What petitioner did to obtain those licenses for 1960 was not in any way in conflict with the Commerce Clause, the Interstate Commerce Act, 49 U. S. C. 1(4), 3(4), and 302 (c)(2), or the *Atchison* case 357 U. S. 77 (1958). Indeed, petitioner does not contend that any of the aforementioned requirements do conflict with its interstate business. In regard to insurance, it expressly states that "§ 28-12 of the ordinance requires a terminal vehicle operator to carry adequate public liability insurance and this provision is not contested" (Br. p. 26).

Justice Harlan, in his dissent in *Atchison*, stated (357 U. S. at p. 91):

> "Only by refraining from passing on the ordinance until Chicago has had a chance to act under it do we respect the long-standing tradition of this Court not to interfere prematurely with the administration of state and local enactments."

A majority of the Court felt otherwise, and proceeded to declare Section 28-31.1, the long since repealed "convenience and necessity" provision, invalid.

In the case at bar, however, the situation is entirely different. *Here, everyone has acted.* The petitioner has applied for licenses and the City has issued them. What petitioner has to do, what the City requires it to do, has been spelled out by deeds; and there has been no showing of any conflict between the *application* of the ordinance and the movement of interstate commerce. Experience has demonstrated to petitioner that it need only pay the terminal vehicle licensing fees and comply with very modest registration requirements to satisfy the applicable terms of the ordinance.

This Court has frequently affirmed the validity of local enactments requiring registration and the payment of license fees. *Chicago* v. *Atchison, Topeka and Santa Fe Railway Company,* 357 U. S. 77 (1958). *Fry Roofing Co.* v. *Wood,* 344 U. S. 157 (1952), *Columbia Terminals Co.* v. *Lambert,* 30 F. Supp. 28 (1939), affirmed 309 U. S. 620 (1940), *Eichholz* v. *Public Service Commission,* 306 U. S. 268 (1939), *Continental Baking Co.* v. *Woodring,* 286 U. S. 352 (1932). Nothing more is required here.

II.

Petitioner has failed to present a case of actual controversy within the meaning of the Declaratory Judgment Act.

The present action was brought under the Declaratory Judgment Act, 28 U. S. C. § 2201 (R. 5). Both the District Court and the Court of Appeals found there was no case of actual controversy sufficient to warrant enjoining the City of Chicago and its officers from enforcing Chapter 28 of the Municipal Code of Chicago. The District Court, in its Memorandum Opinion, stated (R. p. 144):

> "Thus far there is no indication that the City has taken or will take any action in the exercise of its police powers that would either interfere with interstate com-

merce or would violate the plaintiff's right to due process of law."

The Court of Appeals, in *Railroad Transfer Service, Inc.* v. *City of Chicago*, 358 F. 2d 55 (1966), said (p. 59):

"No actual controversy has been presented to the district court as required by 28 U. S. C. A. § 2201."

In regard to an action brought under the Declaratory Judgment Act, 28 U. S. C. § 2201, this Court, in *Public Affairs Press* v. *Rickover*, 369 U. S. 111 (1961), stated (p. 112):

"The Declaratory Judgment Act was an authorization not a command. It gave the federal courts competence to make a declaration of rights; it did not impose a duty to do so. *Brillhart* v. *Excess Ins. Co.*, 316 U. S. 491, 494, 499; *Great Lakes Co.* v. *Huffman*, 319 U. S. 293, 299-300; *Federation of Labor* v. *McAdory*, 325 U. S. 450, 462; *Mechling Barge Lines* v. *United States*, 368 U. S. 324, 331. Of course a district court cannot decline to entertain such an action as a matter of whim or personal disinclination. 'A declaratory judgment, like other forms of equitable relief, should be granted only as a matter of judicial discretion, exercised in the public interest.' *Eccles* v. *Peoples Bank*, 333 U. S. 426, 431."

In the case at bar, the discretion of the District Court was properly exercised. There has been no showing of any case of actual controversy.

A. Section 28-6, which has not been applied to petitioner, is substantially the same now as when Transfer first attacked the validity of Chapter 28 in 1956. It is totally unlike the long since repealed "convenience and necessity" provision, and petitioner's present characterization of it appeared for the first time in its Petition for a Writ of Certiorari.

The crux of the petitioner's argument concerning Section 28-6 of the Municipal Code of Chicago is summed up in its Brief as follows (Br. pp. 8, 9):

"The requirement of § 28-6 that petitioner must prove *annually* to the City's satisfaction that it is 'qualified to pursue the occupation of' transferring interstate passengers between railroad stations, as a fixed condition to the right to perform the service, conflicts with §§ 1(4), and 202(c)(2) of the Interstate Commerce Act, 49 U. S. C. §§ 1(4), 3(4), 302(c)(2).

* * * * * *

"This clause of § 28-6 was enacted at the same time that the City Council repealed the requirement for proof of public convenience and necessity that was declared invalid in *Atchison*. The history of this clause and its structure within § 28-6 show that it was intended by a hostile City Council as further harassment of petitioner. If the City had wished in good faith to conform to the mandate of *Atchison* and limit its regulation of petitioner to simple licensing and lawful police regulation it easily could have done so, instead of arrogating to itself every year the right to determine whether petitioner is 'qualified to pursue the occupation of' transferring passengers. This clause is clearly set forth in § 28-6 as a requirement that is entirely separated from and independent of ordinary licensing and safety provisions."

Section 28-6 of the Municipal Code of Chicago has been the victim of unfettered imagination. Contrary to petitioner's assertions, it, and not the City, has resurrected this section for the sole purpose of creating a controversy where none exists.

It should first be made clear that Section 28-6 is not, as petitioner argues, a replacement for Section 28-31.1. This latter provision was declared invalid in *Chicago* v. *Atchison, Topeka & Santa Fe Railway Co.*, 357 U. S. 77 (1958), and was repealed in 1959 (R. 30). Section 28-31.1 applied *exclusively* to terminal vehicles (R. 26). It required that the City Council upon the recommendation of the Commissioner should determine whether "public convenience and necessity" required additional terminal vehicle serv-

ice (R. 26). Transfer was precluded from operating until it secured such a certificate. *Atchison,* 357 U. S. 77, 84, 85. This Court there pointed out that both the District Court and the Court of Appeals had held that Section 28-31.1 applied to Transfer and that the City had conceded that the section was clearly applicable to Transfer, saying (357 U. S. at p. 84):

> "After full argument on that point, both the District Court and a unanimous Court of Appeals held that § 28-31.1 applied to Transfer. That was the position of the city in both courts and it made no move there to have the matter remitted to the state courts. After referring to the provisions of § 28-31.1 the City declared in its brief in the Court of Appeals: 'A more accurate description of the business engaged in by Transfer would be hard to find.' We think this is a fair summarization."

This is not the situation in the case at bar.

Unlike the long since repealed Section 28-31.1, Section 28-6 does not single out "terminal vehicles" as the sole reason for its being. Transfer operates only twenty vehicles, while Section 28-6 was designed to apply to the thousands of other public passenger vehicles which are regulated by Chapter 28.

Unlike the situation in *Atchison,* neither the District Court nor the Court of Appeals has found that Section 28-6 applies to Transfer. The *City specifically denies that Transfer must prove "annually that it is qualified."* The City has maintained throughout this litigation that it is bound by this Court's determination in *Atchison,* and that the railroads are free to determine who shall transfer passengers between railway stations (R. 136).

In *Atchison,* unlike the situation in this case, the Parmelee Transportation Company, which was attempting to compete with Transfer for the interstation service, and

which had been rejected by the railroads, was granted automatically renewable licenses, "in perpetuity," in contrast with Transfer having to prove that "public convenience and necessity" demanded additional service (Br. p. 4.) This Court there said (357 U. S. at p. 88):

> "The railroads have rejected as unsuitable the only transfer service now licensed to operate by the City. If local officials can prevent them from providing this service by some other means a breakdown in the organized transfer of passengers could result. At a minimum they would be forced to deal once again with the rejected operator."

In the present case, Transfer has no competition; there has been no effort to discriminate against it; and the railroad's chosen agent is now, and has been, providing interstation transportation service.

Transfer does not have to obtain a certificate of convenience and necessity or prove the "elements" thereof as petitioner claims (Br. p. 27). To the contrary, as has already been demonstrated, petitioner is operating its vehicles and has been continuously operating its vehicles on the streets of Chicago without interruption. *It has applied for and received licenses for its vehicles* without being subjected to any of the forbidden practices it now attributes to the ordinance.

Section 28-6 has remained substantially unchanged since 1956 when petitioner first launched its attack on Chapter 28 of the Municipal Code. *Atchison, Topeka and Santa Fe Railway Co.* v. *City of Chicago,* 136 Fed. Supp. 476 (N.D. Ill. 1956). At that time Section 28-6 provided as follows (R. 20):

> "Upon receipt of an application for a public passenger vehicle license the commissioner shall cause an investigation to be made of the character and reputa-

tion of the applicant as a *law abiding citizen;* the financial ability of the applicant to *render safe and comfortable transportation service,* to *maintain or replace the equipment* for such service and to *pay all judgments and awards* which may be rendered for any cause arising out of the operation of a public passenger vehicle during the license period. *If the commissioner shall find that the applicant is qualified and that the vehicle for which a license is applied for is in safe and proper condition* as provided in this chapter, the commissioner shall issue a public passenger vehicle license to the owner of the vehicle *for the license period ending on the thirty-first day of December* following the date of its issuance, subject to payment of the public passenger vehicle license fee for the current year." (Emphasis added.)

Section 28-6 now provides (R. 20, 27):

"Upon receipt of an application for a public passenger vehicle license the commissioner shall cause an investigation to be made of the character and reputation of the applicant as a *law abiding citizen;* the financial ability of the applicant to *render safe and comfortable transportation service,* to *maintain or replace the equipment* for such service and to *pay all judgments and awards* which may be rendered for any cause arising out of the operation of a public passenger vehicle during the license period. If the commissioner shall find that the application, and all other statements and documents required to be filed with said application have been properly executed, and *that the applicant is qualified to pursue the occupation of a cabman or coachman,* the commissioner shall issue to him and in his name a license for each public passenger vehicle applied for, *to terminate on the 31st day of December following the date of issue,* provided that each *said vehicle is registered in applicant's name and is in safe and proper condition* at the time the license is issued." (Emphasis added.)

Seizing upon this amendment, which on its face appears innocuous, petitioner has concluded that the City amended this provision to serve as a replacement for the repealed Section 28-31.1, in a "die hard effort to impair constitutional rights" (Br. pp. 15, 20). Contrary to this contention, prior to the amendment, in regard to those to whom it applied, the portion of the provision referred to by petitioner read (R. 20, 21):

> "If the commissioner shall find that the applicant is qualified . . . the commissioner shall issue a public passenger vehicle license for the license period ending on the 31st day of December following the date of its issuance . . ."

After the amendment, in regard to those to whom it applied, the portion of the provision referred to by petitioner read (R. 27):

> "If the commissioner shall find that the . . . applicant is qualified to pursue the occupation of a cabman or coachman, the commissioner shall issue . . . a license . . . to terminate on the 31st day of December following the date of issue . . ."

According to petitioner this new provision *added* the requirement that "the commissioner is to consider *each year* whether 'the applicant is *qualified to pursue the occupation* of a cabman or coachman'." (Br. p. 16). In reality, the only apparent difference in the ordinance, following its amendment, is the use of the specific terms "cabman" and "coachman." In both variations the applicant was determined qualified by the commissioner and the license expired on the 31st day of December.

The use of the specific terms "cabman" and "coachman" has a much blander explanation than petitioner would hope. Prior to 1959, all public passenger vehicles, of which there were 5,120 licensed as of 1963 (R. 95), were classified within the definition section of Chapter 28, under the terms "bus-

man", "cabman" or "coachman" (R. 19). Following the 1959 amendments to the ordinance the term "busman" was deleted and all public passenger vehicles were classified under the terms "cabman" or "coachman" (R. 27). Section 28-6 was amended to reflect this change.

In 1956 Transfer first brought an action to have all of Chapter 28 of the Municipal Code of Chicago declared invalid as applied to it. The Federal District Court upheld the validity of the entire Chapter. *Atchison, Topeka & Santa Fe Railway Co.*, v. *City of Chicago*, 136 Fed. Supp. 476 (N. D. Ill. 1956). The Court of Appeals for the Seventh Circuit reversed only to the extent of holding Section 28-31.1 unconstitutional, 240 F. 2d 930 (7th Cir. 1957). This Court affirmed the Court of Appeals, 357 U. S. 77 (1958). In its brief before this Court at that time, petitioner stated (Brief of Appellees-Respondents, In the Supreme Court of the United States, No. 104, filed October 21, 1957, pp. 5, 13, 17, 46):

> "The City of Chicago has regulated the interstation transfer vehicles for many years by Chapter 28 of the Chicago Municipal Code. This Chapter regulates all 'public passenger vehicles' and includes the transfer vehicles which it defines as 'terminal vehicles.' Prior to July 26, 1955, terminal vehicles were covered only by §§ 28-1 to 28-18, 28-31, and 28-32 of Chapter 28 (R. 171-189). *These sections of Chapter 28 are not in issue, having been found applicable and valid by the Court of Appeals* (R. 208-209, 200). They require a license for identification and regulation (R. 173, 174, 177 §§ 28-2, 28-5, 28-10, 28-11), an annual license fee (R. 175 § 28-7), observance of safety regulations (R. 173, 174, 181 §§ 28-4, 28-4.1, 28-17), and carrying insurance (R. 178 § 28-12). These provisions may be enforced by suspension or revocation of the license and by fines for violations (R. 179, 180, 189 §§ 28-14, 28-15, 28-32; R. 208-209)."

"Since only § 28-31.1 of Chapter 28 was held invalid, there remain in Chapter 28 licensing provisions as comprehensive as legitimate exercise of the police power can permit."

* * * * *

". . . *The Court held all of the rest of the ordinance* (R. 171-189, 44-45) *applicable and valid* (R. 208-210, 200). *Thus all of the ordinance existing prior to 1955, described by Parmelee,* pp. 5-7, *and which Parmelee considered adequate regulation,* p. 5, *still remains applicable and valid under the decision of the Court of Appeals.*"

* * * * *

We have pointed out above, p. 5, *that the Court of Appeals held only § 28-31.1 (R. 44-45) invalid* (R. 208) *and held the rest of Chapter 28* (R. 171-189) *valid and applicable* (R. 208-209, 200). There thus remain in Chapter 28 licensing provisions *as comprehensive as legitimate exercise of the police power can permit.*" (Emphasis added.)

To the extent that Section 28-6 has remained the same, and was part of the ordinance challenged in 1956, it should remain free from this belated attack on its validity. *Cromwell* v. *County of Sac,* 94 U. S. 351 (1876).

Further, by a peculiar method of statutory interpretation petitioner has disassociated the first and second sentences of Section 28-6. Petitioner states in regard to the clause contained in the last sentence of Section 28-6 (Br. p. 17):

> "It has no relation to any other requirement of the ordinance, either preceding or following it."

To the contrary, even as to those to whom it applies, Section 28-6 does not grant the Commisioner unfettered authority to determine who is qualified and who is not. Rather, the first sentence of the section, the sentence Transfer chooses to ignore, sets forth *particular* characteristics an applicant should possess. The ordinance requires that an applicant be a "law abiding citizen;" that he show finan-

cial ability, *only to the extent necessary to render "safe and comfortable service"*; and that he "maintain or replace equipment for such service and . . . pay all judgments and awards which may be rendered for any cause arising out of the operation of a public passenger vehicle during the license period." These are specific requirements which directly relate to safety and are the conditions which the commissioner must abide by in determining whether an applicant is qualified. The City has not sought to impose these requirements on the petitioner.

In its Brief filed in this Court in 1957 (No. 104, *Parmelee Transportation Co.* v. *The Atchison, Topeka and Santa Fe Railway Co., et al.*, pp. 5-7), the Parmelee Transportation Company, which formerly conducted the interstation transportation service in Chicago, characterized all the regulatory provisions applicable in 1955. It said in regard to Section 28-6 (p. 6):

> "Section 28-6 required the commissioner to investigate the 'character and reputation of the applicant as a law abiding citizen; the financial ability of the applicant to render safe and comfortable transportation service, to maintain or replace equipment for such service and to pay all judgments and awards which may be rendered for any cause arising out of the operation' of the vehicle."

Railroad Transfer said in regard to the ordinance, as so characterized, in the Brief it filed in 1957 (Brief of Appellees-Respondent's, No. 104, in the Supreme Court of the United States, filed October 21, 1957, p. 17):

> "Thus all of the ordinance existing prior to 1955, described by Parmelee, pp. 5-7, and which Parmelee considered adequate regulation, p. 5, still remains applicable and valid under the decision of the Court of Appeals."

The trepidation with which Transfer now claims to view Section 28-6 is rendered somewhat suspect by the similarity of the ordinance as it existed in 1957 and as it exists now, and by petitioner's acquiescence in the characterization of the ordinance then given, as contrasted with the position it now takes. This suspicion is further amplified by the failure of Transfer's present characterization to manifest itself in the case at bar until it filed its Petition for a Writ of Certiorari (Pet. p. 8).

The present theory was not exhibited in the complaint. Petitioner did characterize Section 28-6, but it characterized it as follows (R. 8):

> "That the Public Vehicle License Commissioner of the City of Chicago is authorized to issue said licenses upon application if he finds 'that each said vehicle *is registered* in applicant's name and is in *safe and proper condition* at the time the license is issued' and if the *cost of said license* is paid by applicant (Sec. 28-6, Municipal Code of Chicago)." (Emphasis added.)

This is a far cry from petitioner's present contention that the City, in its effort to subvert this Court's decision in *Atchison*, 357 U. S. 77 (1958), amended the ordinance to require petitioner to prove *annually* that it is " 'qualified to pursue the occupation of' transferring interstate passengers between railroad stations . . ." (Br. p. 8). A broad gap exists between a requirement that the Commissioner find that the "vehicle is registered in applicant's name and is in safe and proper condition" and the present contention of the petitioner that it must "annually" prove that it is "qualified."

The District Court was not called upon to decide the issue now presented to this Court. In its first opinion that Court characterized the basis of petitioner's Complaint as follows (R. 133):

> "If I am to find the principal source of the plaintiff's

> claimed grievance, it is that plaintiff is required to pay an annual 'license or tax' to the City of Chicago for the privilege of operating its terminal vehicles, whereas public utilities and other companies carrying on a similar business are not subject to the same requirement."

The Court of Appeals also failed to hear the present argument. There petitioner said in regard to Section 28-6 (Brief and Appendix for Plaintiff-Appellant, in the United States Court of Appeals, No. 15230, filed September 1965, p. 11):

> "Furthermore Section 28-6 permits the Commissioner to refuse to renew plaintiff's licenses without giving it a hearing after the Commissioner finds plaintiff not to be in compliance with all of the provisions of the ordinance."

There is an absence of similarity between the position taken by petitioner in the Courts below and the position it now takes in regard to this provision. It is doubtful whether petitioner can properly change its theory of the case at this late date, but, even if this Court permits such a change, the sincerity of Transfer's fears regarding Section 28-6 cannot help but be questioned.

In *Columbia Terminals Corp.* v. *Lambert*, 30 Fed. Supp. 28 (1939), affirmed by this Court on appeal, 309 U. S. 620 (1940), a Missouri statute required motor carriers to obtain a permit, to carry insurance, and to observe certain safety regulations. *Columbia* did not apply for a State permit. It did apply for a federal permit but the Interstate Commerce Commission held [as it has held with respect to the transfer operations in this case, *Status of Parmelee Transportation Co.*, 288 I. C. C. 95 (1953)] that the service was not subject to federal regulation under the Motor Carrier Act. [Transfer's operations are not within the coverage of Part II of the Interstate Commerce Act,

which regulates motor carriers and it is not a "carrier" under Part I of that Act (288 I. C. C. 95, 104 (1953)]. When the State took steps to enforce the licensing requirement, *Columbia* sued for an injunction in a three-judge Court. After reviewing the pertinent decisions, the District Court recognized that the commerce clause is violated when a State "undertakes to exercise the right to say what interstate commerce will benefit the State and what will not." (30 Fed. Supp. at p. 32). It said, however (30 Fed. Supp. at p. 32):

> "The mere susceptibility of a statute to a construction which could render it unconstitutional does not afford sufficient ground for injunctive relief where, as here, it does not appear that the statute has ever been so construed, where the enforcing authorities affirm a recognition of its unconstitutionality if so construed and disclaim any intention to do so, and where plaintiff's real ground for relief is not the application of the statute to it."

These words are especially appropriate here. This Court is being presented with an interpretation of the City's ordinance which the City has specifically rejected, and is being asked to construe a provision of that ordinance in a manner which could render it unconstitutional, in spite of the fact that petitioner's "real ground for relief is not the application of the [contested provisions] to it." The holding in *Columbia Terminals* was approved in *Fry Roofing Co.* v. *Wood*, 344 U. S. 157, 162 (1952).

This Court has long recognized the canon that legislation is to be construed, if possible, to avoid constitutional questions. *Phyle* v. *Duffy*, 334 U. S. 431, 441 (1948); *Gerende* v. *Board of Supervisors of Elections of Baltimore City*, 341 U. S. 56, 57 (1951). In the case at bar the plainest construction of the ordinance is one which avoids a question of its constitutionality.

B. *Petitioner maintains its principal place of business in the City because its business is transporting passengers and baggage from one railway terminal in Chicago to another railway terminal in Chicago.*

The petitioner has attacked three other provisions of Chapter 28 of the Municipal Code of the City of Chicago. Petitioner argues (Br. p. 25) that it "cannot lawfully be compelled to maintain its principal place of business in Chicago." Contrary to this, petitioner, prior to the filing of this suit, voluntarily established its principal place of business in Chicago (R. 5). Petitioner maintains its principal place of business in the City not because of any compulsion, but because the exclusive nature of its business is transporting railroad passengers and baggage from one railway terminal in Chicago to another railway terminal in Chicago (R. 7).

Petitioner alleged in its complaint (R. 5):

> "that it is a corporation organized and existing under and by virtue of the laws of the State of Delaware with its principal place of business in the City of Chicago, Illinois."

It does not allege that it wishes to maintain its principal place of business elsewhere. Surely, no controversy is engendered by an ordinance requiring petitioner to do that which it is doing, especially where it has not expressed a desire to do anything else. Furthermore, petitioner's argument assumes that the provision challenged, Section 28-5.1, applies to it. This has not been established. Section 28-5.1 was held valid in *Evanston Cab Co.* v. *City of Chicago,* 325 F. 2d 907 (7th Cir. 1963), certiorari denied, 377 U. S. 943 (1964).

Petitioner also argues (Br. p. 22) that the Court of Appeals in using the phrase "accessible responsibility" "overlooked that the Chicago railroads are totally respon-

sible for the interstation transfer service, and are permanently accessible." Under Illinois law, however, Transfer would be considered an independent contractor,* and it is doubtful if the railroads would consider themselves liable in a personal injury action occasioned by the negligent operation of one of petitioner's vehicles. *Densby* v. *Bartlett*, 318 Ill. 616 (1925), *Schluraff* v. *Shore Line Motor Coach Co.*, 269 Ill. App. 569 (1933).

Petitioner contends that (Br. p. 25)

> "[if] every state or every city were to command that every corporation engaged in interstate motor transportation must maintain its principal place of business within the territory of the legislative body the result would be intolerable burdens of proliferation or reorganization."

Of course, the simple answer to this is that no such requirement is involved here. Assuming, for the sake of argument, that Section 28-5.1 is applicable to petitioner, the contention which petitioner makes does not apply to it. Transfer is the unique interstate carrier which operates only on the streets of the City of Chicago. It need not be concerned with enactments of other local governments.

C. *The provision requiring chauffeurs who drive vehicles which operate only on the streets of Chicago to be residents of the City is not contained in any of the sections of the ordinance being challenged. Petitioner has not alleged any injury to itself because of this provision, and the provision establishes "accessible responsibility."*

Petitioner also argues (Br. p. 25) that "[t]he restriction that only residents of Chicago may be employed as chauffeurs is obviously unreasonable and unrelated to traffic

* Transfer operates under a year to year contract between itself and the railroads (R. 7).

safety . . ." It is questionable whether petitioner can properly raise this issue since the provision relating to a chauffeur's qualifications is not contained in any of the sections of the ordinance being attacked. Section 28-1, which petitioner refers to (Br. p. 6), merely contains the definition of a chauffeur, which, of itself, does not require as a prerequisite to licensing, residency in the City.

Furthermore, there is no allegation that this requirement has in any way damaged petitioner or affected its ability to obtain competent drivers or, in fact, that this provision has been applied to it.* Petitioner, therefore, has no standing to attack this provision. In any case, petitioner's operation is conducted solely in Chicago, and a requirement that chauffeurs reside in Chicago establishes as the Court of Appeals pointed out, "accessible responsibility." *Railroad Transfer Service, Inc.* v. *City of Chicago,* 358 F. 2d 55, 58 (1966).

Petitioner cites *Adams Express Corporation* v. *New York,* 232 U. S. 14 (1914), which it states (Br. p. 25) "condemned a provision of the ordinance of the City of New York which had the practical effect of limiting drivers of express wagons to residents of that city." In *Adams,* the express company did a regular business with New Jersey and other cities outside of New York (232 U. S. at p. 28). Here, petitioner's business is conducted solely within the City of Chicago.

The petitioner quotes (Br. p. 25) from *Adams,* 232 U. S. at p. 34:

> "When . . . the obvious convenience of their being able to secure drivers in Jersey City as well as in New York, are considered, the provision would seem to be unnecessarily burdensome."

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* The Commissioner's only order in regard to Transfer's employees was that they be fingerprinted and examined by doctors and this was complied with (R. 153).

Petitioner fails to quote the next sentence of the opinion (232 U. S. at p. 34):

> "We are not called upon, however, to decide this point."

In *Railway Express* v. *New York,* 336 U. S. 106 (1949), this Court, in upholding the validity of a local regulation prohibiting advertising on vehicles other than those whereon the product or business of the owner was advertised, said (p. 111):

> "It is finally contended that the regulation is a burden on interstate commerce in violation of Art. I, § 8 of the Constitution. Many of these trucks are engaged in delivering goods in interstate commerce from New Jersey to New York. Where traffic control and the use of highways are involved and where there is no conflicting federal regulation, great leeway is allowed local authorities, even though the local regulation materially interferes with interstate commerce. The case in that posture is controlled by *S. C. Hwy. Dept.* v. *Barnwell Bros.,* 303 U. S. 177, 187, *et seq.*"

The regulations promulgated by the Interstate Commerce Commission do not in any way conflict with the City's ordinance. The regulations specifically state (49 C. F. R. § 190.30 (1964)):

> "Except as otherwise specifically indicated Parts 190-197 of this subchapter are not intended to preclude States or subdivisions thereof from establishing or enforcing State or local laws relating to safety, the compliance with which would not prevent full compliance with these regulations by the persons subject thereto."

The regulations further specifically provide (49 C. F. R. § 190.33 (1964)) that as to vehicles and drivers operating wholly within a municipality, the regulations are only applicable "when the vehicle involved is transporting explosives or other dangerous articles . . ."

Unlike the situation in 1914 when the *Adams* case was decided, this is a time when each year traffic accidents kill thousands of people and inflict millions of dollars worth of personal injury and property damage. To require "accessible responsibility" of drivers who operate solely within Chicago is not unrelated to traffic safety. The validity of this provision was upheld in *City of Chicago* v. *Vokes*, 28 Ill. 2d 475, certiorari denied 377 U. S. 124 (1964).

D. *Section 28-30.1 was designed to apply only to taxi-cab operators for use in determining rates. It does not apply to petitioner.*

Finally, the petitioner argues (Br. p. 24) that "[t]he city may not impose the requirement that petitioner shall file annually with the City a detailed statement of its expenses and earnings, and its balance sheet, and afford the city access to its books." The provision it says imposes this requirement is Section 28-30.1. This issue was not raised in the complaint (R. 5-14), was not argued before the District Court (R. 132), or the Court of Appeals, 358 F. 2d 55 (1966). It is not properly before this Court. Furthermore, there is nothing in the record to indicate that petitioner has been asked to comply with any such provision.

Even a cursory examination of the section indicates that it has no relationship to petitioner, but is designed for use in determining proper taxicab rates (R. 43). If, as petitioner argues, Section 28-6 (Br. p. 15), which was discussed earlier, was amended to include the term "coachman" so as to be made applicable to Transfer, then to be consistent, that term should have been carried over to Section 28-30.1, when it was amended. This was not done. Instead, this latter section refers to "every cabman, corporation and affiliate . . ." The use of the term "corporation" simply serves to include both individual and corporate taxicab

operators. By its very nature, the regulation of thousands of vehicles, the language used in Chapter 28 of the ordinance is often broad in scope. This does not mean that all those who could possibly be included fall within its coverage. Certainly, "corporation" does not refer to every corporation doing business in the City.

A review of the specific sections being challenged demonstrates that no case of actual controversy has been presented within the meaning of the Declaratory Judgment Act. Recognizing the presumption of validity in favor of the ordinance it would be contrary to the meaning of the Act to allow a cause of action for the sole purpose of testing the validity of provisions of an ordinance which have not been applied to petitioner, and which have not interfered with its business. In *Public Service Commission* v. *Wycoff Co.*, 344 U. S. 237 (1952), this Court, in denying a similar request for relief said (pp. 244, 245, 246):

> "A multitude of rights and immunities may be predicated upon the premise that a business consists of interstate commerce. What are the specific ones in controversy? The record is silent and counsel little more articulate. We may surmise that the purpose to be served by a declaratory judgment is ultimately the same as respondent's explanation of the purposes of the injunction it originally asked, which is '*to guard against the possibility* that said Commission would attempt to prevent respondent from operating under its certificate from the Interstate Commerce Commission.'
>
> ". . . We may conjecture that respondent fears some form of administrative or judicial action to prohibit its service on routes wholly within the state without the Commission's leave. What respondent asks is that it win any such case before it is commenced.
>
> ". . . [W]hen the request is not for ultimate determination of rights but for preliminary findings and conclusions intended to fortify the litigant against

future regulation, it would be a rare case in which the relief should be granted."

The case at bar is not one where Transfer has refused to apply for a license and has challenged the constitutionality of the ordinance. *Atchison*, 357 U. S. 77 (1958). This is not a case where Transfer has applied for a license and has been refused. *Buck* v. *Kuykendall*, 267 U. S. 307 (1925), *Bradley* v. *Public Utilities Commission*, 289 U. S. 92 (1933). This is the strange case where Transfer has applied for licenses, has received them, and has subsequently challenged the constitutionality of the ordinance on the ground that interstate commerce has been impeded.

As pointed out by the Court of Appeals, the City recognizes that it cannot prevent the operation of interstate business, although it does have the authority to assess reasonable vehicle license fees and to require compliance with safety regulations. As also pointed out by the Court of Appeals, petitioner has not pleaded any injury and has been conducting "its terminal transfer operation without interruption or interference by Chicago or any of the individual defendants." No actual controversy has been presented, as required by the Declaratory Judgment Act, and, therefore, the opinion of the Court of Appeals should be affirmed.

Conclusion.

For all of these reasons the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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